such interference results in "impairment of efficiency" or "incapacity of performance" of their governmental duties.[17] Since all restrictions, however, interfere with the efficiency and capacity of the governmental agents to a certain extent, it would appear that the test more definitely stated should depend upon the reasonableness of the regulation. This basis was adopted recently by the Supreme Court in upholding state legislation as to patent rights,[18] and it is submitted that the test of the reasonableness of the burden imposed, in view of the governmental nature of the agent affected, forms the most satisfactory method for adjusting the conflicting rights involved.[19]

In a recent federal case, *Larabee* v. *Dolley* (C. C., D. Kan. 1909) 175 Fed. 365, the circuit court condemned the Kansas Bank Guaranty Law because of interference with national banks. Although the act allows such banks to participate in the plan, it was alleged that national banks by the terms of their incorporation, could not legally do so, and consequently that they would suffer through the increased prestige of the state banks. Although it is undoubted that national banks are governmental agencies, this result seems difficult to support. It is to be noted that the legislation in question was designed as a police measure to protect the citizens of the state in their relations with the state banks, and that as such it placed no direct burden of any kind upon the national banks. It would appear difficult to say that such interference, arising solely from the more efficient competition of the state banks, if interference at all from a legal point of view, is in any way an unreasonable interference; and if the test outlined above is correct, the decision must undoubtedly be considered unsound. Certainly the Supreme Court has given no intimation that the protection of governmental agencies extends to this extraordinary point, and it would appear that due regard for the sovereign nature of the state, as well as the nation, would prevent the upholding of the result reached.

A NOMINATED EXECUTOR'S RIGHT TO REIMBURSEMENT FROM THE ESTATE FOR THE EXPENSES OF CONTESTED PROBATE.—It is well settled that an administrator or executor, having acted in good faith and with ordinary prudence, is entitled to be credited for all costs and expenses he may have been compelled to pay for litigation affecting the estate in his charge,[1] and his right depends, not on the favorable issue of the litigation, but only on his good faith in prosecuting or defending.[2] To support his claim to reimbursement, however, it must appear either that the litigation was for the benefit of the estate[3] or that in engaging therein the executor performed a legal duty, and did not voluntarily

[17]National Bank *v.* Comw. (1869) 9 Wall. 353; McClellan *v.* Chipman (1896) 164 U. S. 347.

[18]Allen *v.* Riley (1906) 203 U. S. 347; and see N. Dakota *ex rel. v.* Hanson (1909) 30 Sup. Ct. Rep. 178.

[19]Western Union Telegraph Co. *v.* Mayor of N. Y. (1889) 38 Fed. 552.

[1]Hardy *v.* Call (1819) 15 Mass. 530; Collins *v.* Hoxie (N. Y. 1841) 9 Paige 81.

[2]Moore *v.* Randolph's Adm'r. (1881) 70 Ala. 575; Polhemus *v.* Middleton (1883) 37 N. J. Eq. 240.

[3]Mumper's Appeal (Pa. 1842) 3 W. & S. 441.

assume a burden properly belonging to others.[4] Both factors are clearly present in all litigation concerned with the collection and payment of debts, and compensation will be allowed for expenditures for this purpose, even to a *de facto* personal representative when acting under a will later declared void, because such acts belong strictly to the administration of the estate and must be performed whether there is a valid will or not.[5]

Litigation for the purpose of establishing or maintaining a will, however, stands upon a different basis. In conducting such proceedings the executor cannot be said to act in his administrative capacity because the payment of legacies and the distribution of assets are not strictly acts of administration, but depend wholly upon the will for their validity and authority. Nor does he act as representative of the estate because it is his authority so to act which is one of the questions at issue. But as the establishment or defense of the will enures wholly to the benefit of the devisees or legatees mentioned therein, the executor in supporting that instrument clearly acts only on behalf of the persons interested in the particular distribution contended for [6] and not for the benefit of the estate which can be in no way affected by the issue of the contest.[7] It follows, therefore, that a claim against the estate for the expenses of such litigation can be justified only upon the alternative ground that the nominated executor incurs them in the discharge of a positive legal duty.

The existence and extent of such duty have been variously treated in different jurisdictions, the decisions depending in part upon statutory enactment, but chiefly upon considerations of expediency. In England and a few American jurisdictions where the executor is the only one capable of propounding the will [8] and penalities are imposed for his failure to do so,[9] it is arguable that he is at least entitled to credit for counsel fees incurred in making a formal offer of the will.[10] But where, as in most states, a devisee, legatee or other person interested in the estate may have the will proved,[11] it is doubtful if the executor is under a duty to take even the first formal step. Certainly, where he has brought the will into court and is met, before its probate, with a contest, the executor is under no further obligation, but may cast the burden of the litigation on those who are to be benefited thereby. This result, although accepted only by a minority of jurisdictions rests upon persuasive considerations of policy and expediency: the injustice, if the litigation be unsuccessful, of charging the assets in the hands of those rightfully entitled thereto with the expenses of fruitless litigation for the establishment of invalid wills,[12] and the

[4]Phillip's Executor *v.* Phillip's Adm'r. (1883) 81 Ky. 328.

[5]See N. Y. Code Civ. Proc. § 2650; Bradford *v.* Boudinot (1811) 3 Wash. C. C. 122; and see Brown *v.* Eggleston (1885) 53 Conn. 110, 117.

[6]Andrews' Executor *v.* His Adm'r. (1857) 7 Oh. St. 143; Brown *v.* Vinyard (S. C. 1831) 1 Bailey Eq. 460.

[7]Kelly *v.* Davis (1859) 37 Miss. 76.

[8]1 Williams, Executors (10th ed.) 228; Wankford *v.* Wankford (1699) 1 Salk. 301, 309; Smith *v.* Moore (Me. 1830) 6 Greenl. 274.

[9]54 Geo. III c. 184, 37; 44 Vict. c. 12, 40.

[10]See Raines *v.* Raines' Executor (1874) 51 Ala. 237.

[11]Kenniston *v.* Adams (1888) 80 Me. 290; Ford *v.* Ford (Tenn. 1846) 7 Humph. 192; N. Y. Code Civ. Proc. § 2614.

[12]Kelly *v.* Davis *supra.*

equally grave injustice, even if the litigation be successful, of shifting the burden thereof from the special legatees who are chiefly interested to the residuary distributees whose interests are first affected by allowing the charge against the estate.[13] Moreover, the right to compensation, depending as it does upon the existence of a prior duty, ought logically never to be affected by the favorable issue of the litigation. In this respect, however, the decisions are not consistent, the right to reimbursement being recognized in some jurisdictions when the result of the contest enures to the benefit of those ultimately entitled to the assets.[14] These decisions are justified only on grounds of justice, or as avoiding circuity of action, the proper remedy being one against the legatees personally for services rendered in their behalf. The numerical weight of authority, influenced doubtless by the equities of the situation, allows the executor reimbursement, but the courts content themselves either with the bare assertion of the existence of a duty in the executor to defend the will[15] or rest their conclusion upon wholly insufficient or fallacious grounds: the necessity of imposing upon someone the duty of protecting the interests of the legatees not yet in being,[16] or of giving effect to the express intention of the testator.[17] In cases where the will is assailed because of alleged mental incompetency of the testator or of a second will revoking the first the recognition of a duty upon the latter ground is obviously absurd.

In a recent case, *Dodd* v. *Anderson* (N. Y. 1910) 90 N. E. 1137, the court rejected the claim of a nominated executor against the state for expenses incurred in unsuccessfully propounding the will for probate, advancing the doctrine of expediency and solicitude for the ultimate distributees in support of its conclusions, but basing its decision chiefly upon the ground that, until the issue of letters testamentary, there can be no legal representative of the estate, and, therefore, no duty to act with reference to the will. In reaching this result, the court differentiates the supposed duty to conduct proceedings for establishing the will from the duty to defend the will after probate. In the latter case the duty is emphatically affirmed.[18] This distinction, however, is entirely ignored in other cases, whether the

[13]Mumper's Appeal *supra.* It is notable that an administrator, although representing the heirs, is never authorized to expend the funds of the estate in resisting the probate of a will. Dalyrymple *v.* Gamble (1887) 68 Md. 156; Edwards *v.* Ela (Mass. 1862) 5 Allen 87.

[14]This is the Pennsylvania rule. See Royer's Appeal (1850) 13 Pa. St. 569; Scott's Estate (Pa. 1845) 9 W. & S. 98; but see Mumper's Appeal *supra;* see also Kelly *v.* Davis *supra;* Andrews' Executors *v.* His Adm'r. *supra.*

[15]Pryor *v.* Mizner (1881) 79 Ky. 232; Brown *v.* Gibson (S. C. 1818) 1 Nott & McC. 326; Meeker *v.* Meeker (1888) 74 Ia. 352; Lassiter *v.* Trans (1896) 98 Tenn. 330; but see Ralston *v.* Telfair (N. C. 1839) 2 Dev. & Bat. 414.

[16]Hazard *v.* Engs (1882) 14 R. I. 5.

[17]*In re* Estate of Soulard (1897) 141 Mo. 642.

[18]This distinction obviated the necessity of overruling prior decisions which recognize the duty to defend the will. See Shaffer *v.* Bacon (N. Y. 1898) 35 App. Div. 248, affd. 161 N. Y. 635; Matter of Blair (N. Y. 1901) 67 App. Div. 116. The decisions are unfortunate, but it is doubtful whether, conceding that the distinction sought to be made is sound, it can be applied to these cases, because the expenses for which reimbursement was allowed were incurred both before and after probate.

right to reimbursement is denied or affirmed:[10] the only logical result when the existence or non-existence of the duty rests solely upon a balance of considerations of expediency, for clearly the assets in the hands of those entitled thereto will be equally affected by a recognition of the duty in a contest following, as well as in one preceding, probate. Conceding, moreover, that in the interval between the probate and a subsequent successful contest a nominated executor is a legal representative whose letters will justify an executor's claim for the performance of acts clearly within the scope of his executorial functions, the defense of a contested will does not, in the absence of statute, seem to be such a function. Consequently, this duty apparently rests wholly upon judicial declaration. It would seem, therefore, that if the duty is to be recognized at all, it should be declared to exist as well before, as after probate.

THE RECOGNITION OF THE CORPORATE ENTITY IN SUITS BETWEEN STOCKHOLDERS.—Although the conception of a corporation as a legal entity distinct from the individuals who compose its membership has become familiar through repetition in judicial utterance,[1] courts and authors are far from any real agreement as to the true nature of the conception. By some writers it is termed a fiction, a mere figurative description of the actual fact of the association of individuals for the conduct of business.[2] Others consider it an accurate statement of the fact that the corporation is endowed by law with rights and subjected to obligations, which do not pertain to the individual shareholders jointly or severally. In this view, the corporation is as correctly called a legal entity as is any natural person.[3] Conceding the entity to be a fiction, however, there is no general agreement as to the value of the employment of such a fiction. "The conception of a number of individuals as a corporate or collective entity" is justified as "essential to many of the most ordinary processes of thought," and the fiction of a corporate entity is accordingly considered a principle of great convenience, which in most cases accomplishes justice.[4] On the other hand, the fiction is regretted because it obscures the true nature of the problems arising from corporate activity, and is held responsible for the unsatisfactory state of the decisions in this branch of the law.[5]

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[10]Brown *v.* Vinyard *supra;* Andrews' Executors *v.* His Adm'r. *supra;* Mumper's Appeal *supra;* Kelly *v.* Davis *supra.* It is interesting to note that the only case recognizing the distinction has reached a result directly *contra* to that in the principal case. *In re* Estate of Soulard *supra.*

[1]Dartmouth College *v.* Woodward (1819) 4 Wheat. 518, 636; *In re* Sheffield etc. Society (1889) L. R. 22 Q. B. D. 470; Gallagher *v.* Germania Brewing Co. (1893) 53 Minn. 214.

[2]Morawetz, Priv. Corps. (2nd ed.) §§ 1, 227.

[3]W. Jethro Brown, The Personality of the Corporation and the State, 21 Law Quart. Rev. 365, 367, 370. For an analysis of the "fiction" and "organic" theories of corporations, see Freund, The Legal Nature of Corporations.

[4]Morawetz, Priv. Corps. (2nd ed.) §§ 1, 234; see also Carr, The Law of Corporations, Ch. XII; Machen, Modern Law of Corporations § 1312.

[5]Taylor, Priv. Corps. (3rd ed.) § 51; Prof. Hohfeld, Nature of Stockholders' Individual Liability for Corporation Debts, 9 COLUMBIA LAW REVIEW 285.